

PHAN (Migration) [2019] AATA 510 (21 February 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms SUONG PHUONG TRINH PHAN

CASE NUMBER: 1709879

DIBP REFERENCE(S): CLF20142/254320

MEMBER: Russell Matheson

DATE: 21 February 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221 of Schedule 2 to the Regulations.

Statement made on 21 February 2019 at 7:52am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine spousal relationship – established a joint household – long-term relationship – detailed consistent evidence – credible witnesses – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 April 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant is a 25-year-old female national of Vietnam. She applied for the visa on 20 December 2012 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because the delegate was not satisfied that the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
5. The applicant appeared before the Tribunal on 30 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and the sponsor's mother. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
9. The Tribunal has before it the file from the Department of Immigration (the Department) relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
10. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

11. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there

must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married on 18 November 2012 at Bankstown NSW. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
14. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3).
15. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
16. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence and a witness at the hearing and found their evidence to be detailed, consistent and overall, credible. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department and the Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
17. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing. The Tribunal is satisfied that the parties were credible witnesses.

Are the other requirements for a spouse relationship met?

18. Financial aspects

19. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.
20. The parties provided evidence of operating a joint bank account with the Commonwealth Bank. They provided statements for the periods 7 April to 30 June 2017 and 1 July 2017 to

30 December 2017. The applicant and sponsor told the Tribunal that they have their own personal accounts and transfer money into the joint account. The parties stated that they use the joint account for their day-to-day living expenses and paying bills. The parties presented debit cards linked to their joint account as evidence. The parties stated that they are currently living with the sponsor's mother and brother and share the household bills. They further stated that they give the sponsor's mother \$500 per week to assist with the bills and groceries and daily living expenses. The sponsor gave evidence that he works part time at Aldi and his wage is deposited into his personal account and he transfers money into the joint account for day-to-day living expenses. He further stated that the applicant works in a nail salon and gets paid cash.

21. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is limited evidence before the Tribunal to support that the parties share the day-to-day living expenses.
22. The parties presented limited evidence of the financial aspects of the relationship to support that they are in a genuine and continuing relationship. The Tribunal places little weight on this aspect of the relationship.

23. *Nature of the household*

24. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
25. The couple gave detailed and consistent evidence about their living arrangements and the household duties and responsibilities. The Tribunal is satisfied that they live together. The applicant and the sponsor spoke about sharing the different aspects of housework and individual tasks in detail. They provided consistent evidence of their living arrangements and details about their daily lives, activities and employment. The parties provided additional documentary evidence in joint names for the purchase of household items. They also stated that they have advised government authorities in regard to their marital status.
26. The Tribunal accepts the parties live together and that they have established a joint household. The Tribunal is satisfied that they share the household duties and responsibilities.

27. *Social aspects*

28. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
29. There are statements from third parties and family members who expressed their belief that the relationship is a genuine one. There is also photographic evidence of the couple's joint social activities in Australia and overseas in Vietnam and Thailand. In oral evidence the couple outlined their social activities and referred to having a close relationship with family members. The Tribunal is satisfied the parties represent themselves to other people as being married to each other. The Tribunal is satisfied that in the opinion of friends and acquaintances they are in a genuine spousal relationship. The Tribunal is satisfied the applicant and the sponsor plan and undertake joint social activities. The Tribunal is satisfied that there is family support for the relationship.

30. The Tribunal is satisfied they plan and undertake joint social activities and represent themselves to others as being married to each other. The Tribunal accepts that the parties' family and friends accept that they are in a genuine and continuing spousal relationship. The Tribunal is satisfied that there is family support for the relationship.

31. Commitment

32. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
33. The parties claim to have first met in March 2012 at McDonalds in Lakemba with their relationship developing over the ensuing months with the sponsor proposing to the applicant in September 2012. The parties stated that they started living together at the sponsor's home with his mother and brother from October 2012. The parties were married on 18 November 2012 at a restaurant in Bankstown. The applicant provided a copy of the marriage certificate with the visa application. The Tribunal accepts that they are legally married and have been in a long-term relationship and they have been married for a period of time exceeding six years.
34. The parties stated that they had long-term plans to purchase their own home or add a granny flat to the rear of the sponsor's mother's house and start a family. They further stated that they would like to open their own nail salon in the future. The Tribunal found the parties to be genuine in regard to their future plans.
35. The applicant and sponsor provided detailed and consistent evidence of their life together including living with and providing care and support for each other during stressful times. The parties provided evidence of their love, mutual care, understanding and support of each other during their relationship. The parties stated that they have been in a long-term relationship and have always been there for each other and wish to build a better life and future together. The sponsor provided evidence of studying for a Bachelor of Social Work degree at ACU with a view to future employment and financial stability for the couple. The parties provided persuasive oral evidence of their future plans together and the Tribunal found them to be genuine. The Tribunal is satisfied the parties see their relationship as stable, mutually supportive and long-term.
36. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations. The Tribunal is satisfied the parties provided each other a strong degree of companionship and emotional support that is commensurate with a couple being in a marital relationship.

37. Findings

38. Having considered all aspects of the relationship, the Tribunal is satisfied that the applicant and the sponsor have a mutual commitment to shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship.
39. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) of the Act are met at the time of this decision.
40. Therefore the applicant meets cl.801.221(2)(c).

41. Conclusion

42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

43. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).